

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

In re:

:

Docket #03cv9685

MCRAY, RICHARDSON, SANTANA,  
WISE AND SALAAM LITIGATION

:

: New York, New York  
May 31, 2011

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PROCEEDINGS BEFORE  
MAGISTRATE JUDGE RONALD L. ELLIS,  
UNITED STATES DISTRICT COURT MAGISTRATE JUDGE

APPEARANCES:

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McRay, Richardson,  
Santana, and Salaam:

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None

E X H I B I T S

<u>Exhibit Number</u>	<u>Description</u>	<u>ID</u>	<u>In</u>	<u>Voir Dire</u>
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None

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2 THE CLERK: In the matter of McRay, Richardson,  
3 Santana, Wise & Salaam Litigation. Will all counsel, please  
4 identify yourselves for the record.

5 MR. MYRON BELDOCK: Myron Beldock for the Salaam  
6 plaintiffs with Karen Dippold.

7 HONORABLE JUDGE RONALD L. ELLIS (THE COURT): Good  
8 morning.

9 MS. KAREN DIPPOLD: Good morning.

10 MS. JANE BYRIALSEN: Good morning, Your Honor, Jane  
11 Fisher Byrialsen for the Wise plaintiffs.

12 MR. ROGER WAREHAM: Roger Wareham, John Morefore  
13 (phonetic), and Michael Warren for McCray, Santana and  
14 Richardson. He just stepped out. He'll be right back.

15 MS. ELIZABETH DAITZ: Good morning, Your Honor,  
16 Elizabeth Daitz for defendants and we are awaiting our  
17 colleague Genevieve Nelson should be here momentarily.

18 MR. ANDREW MYERBERG: Andrew Myerberg for the  
19 defendants.

20 MS. ELIZABETH DOLLIN: Good morning, Your Honor,  
21 Elizabeth Dollin for defendants.

22 MS. JESSICA COHEN: Jessica Cohen for defendants.  
23 Good morning, Your Honor.

24 THE COURT: Good morning, everyone. I'm just  
25 reviewing my file and discovered that this is about our one

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2 year anniversary and I noticed nobody brought a cape. Also on  
3 the more serious note, I'm fairly certain that the District  
4 Judge had anticipated, by referring the case to me, that we  
5 would actively monitor the discovery so that it would be done  
6 in as expedited a fashion as could be.

7                 And this is not to say that we have not done that,  
8 although I'm always concerned that we don't let these things  
9 drag on, in particular in a case that has an '03 date. So --  
10 and I understand one of the things on your agenda has to do  
11 with the timing of discovery. So this is not to discourage  
12 you from that; just a gentle reminder that we are in this  
13 together, and hopefully there won't be anything that unduly  
14 protracts the completion of discovery.

15                 I also want to note that this is the first date that  
16 I have my summer students, and so I also want to remind you  
17 that this will be -- this turns out to be their first  
18 experience here, so this will be something memorable for them.  
19 So I don't want to put any --

20                 MR. BELDOCK:   So we should be on our best behavior,  
21 right, Judge?

22                 THE COURT:   I want you to understand that this will  
23 be what you'll be remembered for because you can't make a good  
24 first impression after this.

25                 So that having been said, I do know that you have

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2 been at least meeting, conferring. I understand from my law  
3 clerk that there are a couple of applications.

4 MS. DAITZ: Actually, Your Honor, we anticipated  
5 making two applications this morning, but we had an  
6 opportunity to speak with plaintiffs before the conference,  
7 and I believe we may have obviated the need for one and  
8 potentially at least postpone the second.

9 But just to let the court know, we had anticipated  
10 moving to compel contact information for nonparty witnesses.  
11 The plaintiffs have agreed to provide that information to  
12 defendants. And defendants had anticipated moving to compel  
13 the tax returns from certain of the familial plaintiffs who  
14 are claiming lost wages.

15 Plaintiffs this morning offered to execute a 4506-T  
16 form and the corresponding form from the State Department of  
17 Taxation and Finance for whatever states are applicable, I'm  
18 assuming, to allow defendants to obtain 1099s for the past 10  
19 years.

20 So defendants are going to reserve the right to make  
21 an application to the court to compel tax returns, if  
22 necessary. But in the first instance, we'll accept these  
23 executed forms from plaintiffs, submit them to the IRS and to  
24 the State, and see if the information that we receive in  
25 response is sufficient.

2 THE COURT: Okay. Well, that almost seems as if  
3 the statement I made in the beginning had some retractive  
4 effect. Mr. Beldock?

5 MR. BELDOCK: Mr. Beldock. I think I should go  
6 next. We've agreed subject, of course, to the court's  
7 approval to ask for an extended cutoff date for discovery. I  
8 had mentioned September 27th in the dates in company. I see  
9 that's a Tuesday. More logically, I think it should be the  
10 Friday, September 30th.

11 MS. DAITZ: I think that was the Jewish holiday. I  
12 think that was what --

13 MR. BELDOCK: But as for the date itself, the end  
14 of September is logical. It's now the end of June, Judge, so  
15 that's the first -- that is to say it's the end of June for  
16 the cutoff date that you last set. So we're asking for a  
17 three-month extension, to the end of September.

18 MS. DAITZ: And, Your Honor, I believe that when  
19 the parties conferred last week we, you know, discussed that  
20 discovery cutoff at the end of September would continue to  
21 urge the parties to move forward in discovery and get as much  
22 done as we can. And I must say that we have gotten a  
23 significant amount of discovery done, not just in the last  
24 year, but since the last appearance before the court.

25 | And I think that we are all parties will be acting

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2 in good faith as an endeavor to meet that deadline but we are  
3 not certain that we'll be able to get everything that remains  
4 done by that time.

5 THE COURT: That is absolutely a perfect segue  
6 because I was going to ask you what have you done since we  
7 last met so that I could see whether or not in good faith  
8 you've been working so diligently that I would be giving you  
9 this extension.

10 MS. DAITZ: Your Honor, on February 22nd plaintiffs  
11 advised that they were going to challenge the defendants'  
12 assertion of the attorney work product privilege over  
13 documents in the original case file that were created and  
14 prepared by the Assistant District Attorney defendants in this  
15 case.

16 So plaintiffs took a few weeks to compile a list of  
17 over 8,000 Bates numbers that plaintiffs intended to challenge  
18 on defendants' privilege laws. And since that time,  
19 defendants have undertaken a re-review of those documents. We  
20 have very carefully reviewed each document and last week we  
21 produced 488 pages that we were reversing our assertion of  
22 privilege on and provided an amplified privilege law for a  
23 significant number of the remainder that totals about 4,600-  
24 plus of the 8,000 documents that plaintiffs initially  
25 challenged.

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2           We have also still been receiving releases from  
3 familial plaintiffs that we've been processing, serving  
4 subpoenas, and we've produced the plaintiffs about 4,000 to  
5 5,000 pages of documents, mostly that we received in response  
6 to the subpoenas since the last appearance before the court.

7           The parties have also prepared for a number of  
8 nonparty depositions certain of the other witnesses who were  
9 in Central Park that night. Unfortunately, all the parties  
10 prepared for the deposition and the subpoenas were served.  
11 (Indiscernible) and the witnesses didn't show up for the  
12 depositions. But, again, the preparation time was there.

13           Defendants also served to plaintiffs in early March  
14 with deficiency letters regarding their responses to  
15 defendants' interrogatories and document requests. We  
16 received responses from most, if not all, of the familial  
17 plaintiffs to date and the Wise plaintiffs just agreed this  
18 morning to provide the remaining responses by June 10th. So  
19 the parties have engaged in a significant amount of document  
20 discovery in the last, I would say two months since our last  
21 appearance.

22           THE COURT: I remember that you're going to be  
23 taking a lot of depositions. Do you still plan to take them,  
24 and how many have you taken, and how many do you plan to take  
25 still?

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2 MS. DAITZ: Your Honor, I think we've taken over 50  
3 between both sides, between defendants and nonparty witnesses  
4 so far. The defendants have a number of depositions scheduled  
5 to produce defendants in the next couple of weeks. We were  
6 really unable to prepare and produce witnesses for depositions  
7 at the same time that we were undertaking this privilege  
8 review.

9 And because the privilege review, to the extent it  
10 necessitates a ruling from the court, will bear directly upon  
11 the DA depositions as well as possibly some of the nonparty  
12 depositions, we postponed those, pending the outcome of the  
13 anticipated briefing on the attorney work product privilege.

14 But I think the same number of depositions that we  
15 anticipated is still out there in terms of what we expect to  
16 take and defend.

17 THE COURT: Are you talking about 50 more?

18 MS. DAITZ: I would say at the least. I mean,  
19 alone there are 20 plaintiffs in the case, Your Honor.

20 THE COURT: And between the -- you actually didn't  
21 take any between the last conference and now, did you?

22 MS. DAITZ: We prepared but I don't know that any  
23 went forward. We --

24 THE COURT: Okay. I understand.

25 MS. DAITZ: Oh, I'm sorry, Your Honor. Two

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2 defendants' depositions went forward.

3 THE COURT: All right. You're not putting gloss on  
4 it; these are very straightforward. If you tell me you  
5 didn't, it won't necessarily be fatal to your cause; I just  
6 need to know exactly where we stand. So you were able to take  
7 two. You prepared for some others that didn't take place, so  
8 you have about 50 or 60 to go, about half on each side.

9 MS. DAITZ: I would say that defendants have more  
10 to take at this point most likely since we haven't taken of  
11 the plaintiffs' depositions yet and there are 20 plaintiffs.

12 THE COURT: Okay.

13 MR. BELDOCK: We have five depositions scheduled  
14 for June. I can't say it's all been peaceful and light and  
15 bright because we've not been happy on the plaintiffs' side  
16 with the pace of discovery and the pace of scheduling  
17 depositions.

18 But we understand the explanations given by our  
19 adversaries about the review of the many documents that  
20 they're re-reviewing to determine whether they should be  
21 redacting on basis of privilege or producing them. And it is  
22 a big job, but we've not been taking as many depositions as we  
23 intended in the last few months because of that.

24 We have now set up these five. One is a two-day  
25 session for this month. We have about ten, roughly, that we

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2 are trying to schedule. We put off the District Attorney's  
3 like Linda Fairstein and Lederer and others who are  
4 significant to the end, more or less, wherever that will be  
5 so, because we do need these documents.

6                 The documents that are being withheld have to do  
7 with their depositions and there's going to have to be a  
8 motion to compel, or a motion to uphold their excluding  
9 documents, and a briefing schedule before Your Honor on these  
10 privilege issues.

11                 THE COURT: So you have an extended privilege law  
12 and you have about 500 more documents than you had before.

13                 MR. BELDOCK: Yes, and that's fewer than I  
14 expected, but we have it, and they've gone through thousands  
15 of pages, and we're hoping that they can finish it. What we  
16 were suggesting over here, that is among the plaintiffs'  
17 counsel, outside of extending the cutoff date at least to the  
18 end of September -- just say till the end September for now --  
19 that we have a July date for an appearance before Your Honor,  
20 particularly so that we can get on top of the privilege log  
21 legal issues.

22                 We have among us, July 19th, which is a Tuesday,  
23 would be a good day, if that's okay with the court.

24                 THE COURT: I'm sure it isn't.

25                 MS. DAITZ: I'm out of town that week.

1                   THE COURT: I believe I'm away on a judicial  
2 conference.

3                   MR. BELDOCK: But are you going to be away the  
4 15th, which is a Friday?

5                   MS. DAITZ: I'm not going to know.

6                   MR. BELDOCK: I'm sorry. You have to speak up.

7                   MS. DIPPOLD: She's not available.

8                   MR. BELDOCK: You're not available.

9                   MS. DAITZ: Oh, I just said we're not available.

10                  THE COURT: You're not available when? Sounds like  
11 big chunks of July.

12                  MS. DAITZ: It's my first vacation since 2009, Your  
13 Honor. I'm taking off for July 15th to the following Monday.  
14 I'll be available the week before or preferably the week when  
15 we return.

16                  MR. BELDOCK: Then July 12th, which is a Tuesday.

17                  MS. DAITZ: I just -- I have to say, Your Honor,  
18 defendants are endeavoring with all deliberate speed to finish  
19 this product and produce the documents to plaintiffs. But we  
20 don't believe it would necessarily be fruitful to  
21 schedule an appearance before the court before the parties  
22 have had an opportunity to not just complete the production,  
23 but then to meet and confer to try to narrow down the issues  
24 that won't necessarily be before Your Honor.

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2 And we started that in the most broad terms on  
3 Friday, only because the defendants raised a couple of issues  
4 that comprise of thousands of those pages, that if they  
5 weren't being challenged, would expedite the production and  
6 the review of the documents.

7 So I think we're moving forward the best that we  
8 can, but I just don't know that it would be fruitful to  
9 reserve a date on Your Honor's calendar at this point without  
10 knowing how quickly we could complete --

11 THE COURT: Well, first of all, what does July 12th  
12 look like, Michael?

13 THE CLERK: July 12th (indiscernible) available  
14 because I'm in Chicago.

15 THE COURT: Oh, we don't have this courtroom.  
16 Okay. All right. Well, what exactly are you proposing, Mr.  
17 Beldock? You want -- I mean, what do you think will happen  
18 between now and then that will make that a useful date?

19 MR. BELDOCK: Well, it depends on what Your Honor  
20 will say in response to my next request. We are in dispute  
21 about one scheduling issue. It's our position that we can  
22 move forward sooner than later with the motions having to do  
23 with the privilege log issues.

24 We don't have to have every document unredacted as  
25 will be done by our adversaries as a matter of discretion on

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2 their part, before you rule on these legal issues. The legal  
3 issues are pretty well decided in previous cases. There's a  
4 very prominent --

5 THE COURT: Some of the privileged issues are based  
6 on specific legal positions?

7 MR. BELDOCK: Right, they're of attorney work  
8 product and mostly attorney work product. So there are  
9 principles that are pretty well established in the federal  
10 courts and Southern and Eastern District. We have Judge  
11 Schein (phonetic) who is very excellent decision in Crosby.  
12 It's a long decision. There've been several decisions since.

13 I've given copies of some of them to our adversaries  
14 and I've been suggesting that we don't have to wait till the  
15 end of that process to bring the legal issues to you.

16 THE COURT: But you need to tell me exactly what  
17 you're talking about. I mean, what's -- what is the legal  
18 issue? You said they're claiming work product on what basis  
19 that you think is suspect?

20 MR. BELDOCK: Well, they're claiming work product  
21 on the basis that it's basically opinion of the, in many  
22 instances, of the assistant district attorneys who worked on  
23 the case. And we're claiming that either the work product  
24 doesn't apply or you should review the documents in-camera.

25 THE COURT: Okay. So if I understand it correctly

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2 I could take a whole set of documents and either rule for you  
3 or for the defendants and that would --

4 MR. BELDOCK: That in my opinion would take care of  
5 most of the issues even though you don't have all the  
6 documents because the principles are fairly basic. You're  
7 going to either say yes or no or you're going to say maybe as  
8 to some group, and that's going to take quite a bit of time,  
9 ultimately, if you're reviewing the documents in-camera. And  
10 I would like to move that forward --

11 THE COURT: Are you disagreeing with that, Ms.  
12 Daitz --

13 MR. BELDOCK: -- so they would have some documents.

14 THE COURT: -- that these are -- the claim of  
15 privilege is based on a view that you have as to what kinds of  
16 things would make it work product and that if I were, for  
17 example, if I look at ten documents and they all claim  
18 privilege, and I say, well, you can't get privilege to this  
19 kind of documents, then you'd know which documents fall into  
20 that category.

21 MS. DAITZ: Well, Your Honor, two things. As a  
22 procedural matter, the parties had a two hour meet-and-confer  
23 on Friday afternoon. This was not an issue that was addressed  
24 as one that was being raised at the conference today or one  
25 that was right for judicial intervention.

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2           That being said, we have discussed this issue with  
3 plaintiffs in the past and to give Your Honor a bit of  
4 context, in listing the 8,000-plus documents that plaintiffs  
5 intended to challenge, plaintiffs separated those documents  
6 into exhibits and lists, titled A, B, C, D, F, and G.

7           And in doing so, plaintiffs gave some indication as  
8 to how they were organizing the documents. For instance,  
9 documents that they believed were prepared by the party  
10 district attorneys as opposed to documents they believed were  
11 prepared by others. Or the time period during which they were  
12 created.

13           But we found in our review is that the division of  
14 documents into those exhibits are somewhat arbitrary in that  
15 there are documents that clearly, on the first privilege log,  
16 were indicated were created by parties that are in plaintiffs'  
17 nonparty section.

18           There are documents that were listed by plaintiffs  
19 that were not redacted or withheld by defendants at all, which  
20 has slowed down the pace of our review and production.

21           But because of that and because we started, we  
22 approached the review in the categories that plaintiffs  
23 divided them, we produced Exhibits B and Exhibits G, but we  
24 still have the remaining exhibits to produce. And unless we  
25 submit piecemeal briefs to the court on certain overarching

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2 legal issues, we don't know that we won't come across more  
3 issues that need to be briefed or reviewed, or that plaintiffs  
4 have already, you know, researched and addressed in, you know,  
5 in preparation for the briefing and we haven't even seen the  
6 document yet. So --

7 THE COURT: I'm not sure that responds to my  
8 question. Specifically, I want to know, for example, if you -  
9 - for example, you could claim attorney-client privilege  
10 because these documents were given to my summer interns, and I  
11 could decide whether or not giving stuff to summer interns  
12 allows you to claim privilege, I don't need to see all those  
13 documents; I just want to know if what Mr. Beldock is saying  
14 is true. That we can -- these are categories of documents.

15 If it lends itself to that, first of all, I don't  
16 know that we'd need to have all of the categories. Because if  
17 -- and indeed, if I were to tell you that you can't get  
18 privilege for interns, then subsequent ones, you wouldn't even  
19 -- in looking at them you'd know that you're not going to get  
20 privilege for them anyway.

21 MS. DAITZ: Your Honor, there are only two  
22 categories of documents that I could think of. And again,  
23 this is entirely off the top of my head, since we weren't  
24 apprized of that this issue would be raised at today's  
25 conference -- that I could would have a broad scope of a

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2 ruling that might affect the remaining review and production.

3                   And they're categories that we asked plaintiffs to  
4 withdraw their challenge to, both from the grounds of  
5 relevance and work product. And what I could think of, again,  
6 off the top of my head, is the ADA's legal research, there's  
7 thousands of pages of case law, statutes, rules, some  
8 annotated, some not annotated, that the attorneys in the  
9 course of the prosecution researched these issues just like,  
10 you know, we do in the course of defending this case.

11                   And the second is marked-up copies of transcripts.  
12 For instance, the ADAs used the hearing, there was a six-week  
13 Huntley hearing and the ADAs used the transcripts from the  
14 Huntley hearing to review and prepare for trial. Most of them  
15 have, you know, annotations, attorney mark-ups, questions, et  
16 cetera, on those copies of the transcripts.

17                   We believe that both of those categories of  
18 documents are such core work product, legal thought process  
19 and opinion of these District Attorneys who Judge Batts  
20 dismissed the claims against them in their prosecutorial  
21 capacity on the grounds of absolute immunity. So their  
22 thought process is only relevant, at most, for their role in  
23 the investigative phase; that we believe that they're not  
24 relevant and covered by work product.

25                   But again, to brief those two issues now without

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2 having reviewed the remaining documents and seeing what other  
3 broader categories of documents we could address at one time,  
4 I just think the briefing might be duplicative.

5 THE COURT: Well, I don't see the downside of  
6 identifying broad categories, frankly. Because it seems to me  
7 that eliminates duplication and that eliminates work. And  
8 indeed, if we're going to expedite this, if there are -- and  
9 again, I don't know whether or not they're those categories.

10 If you tell me that there are two broad categories,  
11 I don't know what particular categories you have in mind, Mr.  
12 Beldock, or whether you've discussed them with them. You say  
13 you've given them some cases. I mean I'm still not sure what  
14 category we're talking about.

15 MS. DAITZ: Your Honor, I think, as Mr. Beldock  
16 said, the categories of documents would be like the 3,000  
17 pages that we will research or the 2,000 pages of marked-up  
18 transcripts.

19 MR. BELDOCK: Those are the documents we're least  
20 interested in. I think they're not entitled to attorney-  
21 client work, to attorney work product privilege protection. I  
22 don't understand why -- and I don't want to be critical -- I  
23 don't understand why it takes so long to look through  
24 thousands of pages of research, if that's the process, when  
25 the only thing that one could be concerned about I think, if I

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2 were on their side, were notes made by assistant district  
3 attorneys on the research.

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Those pages can't be every single page but I could  
be wrong. So I think it would be helpful if we could have a  
briefing schedule to address these issues, both by categories  
and in accordance with the principles laid down in these  
cases. The cases are very, very complete in their analysis.  
I don't think there's anything new in the area. Your Honor  
probably knows --

11

THE COURT: I may be the only one in this room  
right now who doesn't quite understand what we're talking  
about. What kinds of documents are you talking about where  
the law is clear? I mean give me an example of the kinds of  
things, not what it says.

16

MR. BELDOCK: Notes taken by Linda Fairstein or by  
Elizabeth Lederer in interviewing witnesses for hearings and  
trials.

19

THE COURT: Okay.

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MR. BELDOCK: Those documents which are significant  
for taking the depositions of those defendants are clearly  
identifiable and --

23

THE COURT: Okay. So these are notes that they  
took when they were interviewing witnesses?

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MR. BELDOCK: Right. And when they were preparing

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2 to have them testify.

3 THE COURT: Okay. And you're claiming that's not  
4 work product?

5 MR. BELDOCK: I'm claiming that it's -- if it is  
6 work product, it's not protected because it's not -- because  
7 they're defendants because one of the issues in this -- there  
8 are a number of issues in this case that would call for Your  
9 Honor not applying the work product protection to those  
10 documents.

11 MS. DAITZ: And Your Honor --

12 MR. BELDOCK: I'm sorry. I didn't really mean to  
13 argue the whole issue today. I was talking about procedure  
14 and whether we could move this forward because I'm the --

15 THE COURT: And just so -- I understand what you're  
16 saying but I'm not sure we can answer that question unless we  
17 know how much benefit we're going to get from it because  
18 there's a lot of work to be done on both sides.

19 And if the briefing, the time taken for briefing  
20 isn't going to have a benefit then I'd rather have people do  
21 depositions and doing other document review.

22 MR. BELDOCK: Some of the depositions depend upon  
23 these documents being produced or not produced, depending upon  
24 what you want to --

25 THE COURT: So you -- but you've had this

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2 discussion with Ms. Daitz about whether or not Ms. Fairstein's  
3 notes, for example, are -- first of all whether or not they're  
4 privileged or whether or not they're work product, and if  
5 they're work product, whether or not they're entitled to  
6 protection. You've had that discussion.

7 MR. BELDOCK: I sent them the cases which I rely  
8 upon for the principle that they should not be protected by  
9 work product. I've asked Ms. Daitz on more than one occasion  
10 -- maybe as many as three or four -- to have this process  
11 moved forward before all the documents are reviewed.

12 And I understand her reluctance to do so, so we  
13 haven't gotten above that.

14 MS. DAITZ: Your Honor, I just -- to resolve one of  
15 these issues, I think we need to make it clear; I spoke with  
16 Mr. Beldock less than a week ago and advised the plaintiffs  
17 that we are producing what the case law, not just that Mr.  
18 Beldock provided, but what the case law in this issue  
19 generally calls fact to work product, including notes taken by  
20 ADAs during the course of interviews.

21 If they were taken and produced as risorial  
22 material, they were produced again in the course of either our  
23 original production where there's reproduction, and they're  
24 being redacted in a limited manner to the extent they reflect  
25 the attorneys opinion or thought process and to the extent

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2 that they are just factual, and we're producing the documents.

3                   And I think if plaintiffs had reviewed the amplified  
4 privilege log and the 488 documents that we produced last  
5 week, that that would be made clear.

6                   But Your Honor, I think what the court just said  
7 moments ago is really what our position is on this. To brief  
8 this issue not we'll have to stop the progress of the document  
9 review. Because we can't brief the issue, review the  
10 documents, and produce the witnesses that we have scheduled  
11 and defendants that we have scheduled to produce in the next  
12 week, all at one time.

13                  THE COURT: Well, that depends on how clear the  
14 issue is. I mean, if you've been discussing the issue, I  
15 mean, how long does briefing take?

16                  MS. DAITZ: Well Your Honor, I don't think the  
17 issue in this circumstance is as clear-cut as plaintiffs make  
18 it out to be. I think it's very unusual that there are party  
19 district attorney defendants who are still in a case in their  
20 investigative capacity but not their prosecutorial capacity in  
21 a case that moves forward into discovery.

22                  And by way of example, both Crosby and Abdel, the  
23 cases provided by Mr. Beldock by defendants, the D.A.s were  
24 not parties. So there was no rule 26 analysis on top of the  
25 Hickman v. Taylor analysis. So I think the issues are a

1           little bit more complex than how plaintiffs are --

2           THE COURT:    That still doesn't answer the question.

3           How long will this briefing going to take? I mean --

4           MS. DAITZ:   I mean, I think --

5           THE COURT:   -- you guys are -- you've been doing  
6           this a while. You're very familiar with it. I mean how much  
7           time are you talking about briefing?

8           MS. DAITZ:   I think if we actually --

9           THE COURT:   In the --

10          MS. DAITZ:   I'm sorry, Your Honor.

11          THE COURT:   -- in the good old days, they'd tell us  
12          to have this stuff in, in 48 hours.

13          MS. DAITZ:   Your Honor, I think if we awaited the  
14          conclusion of the review so that we did one brief at one time,  
15          that we would need I think at most two weeks to prepare, and  
16          that includes calling documents for in-camera review if that  
17          was necessary.

18          MR. BELDOCK:   I thought my suggestion would save  
19          time. If it doesn't save time, then I don't want to withdraw  
20          it, but then it doesn't make sense. I thought that this would  
21          save reviewing documents twice, for example, in some  
22          instances.

23          If we get the court ruling about categories and  
24          telling us -- and then telling us what documents should be

1 provided in-camera because they may redact half of a  
2 particular document. You may see that document in-camera and  
3 say none of it should be redacted. So I thought that would be  
4 helpful.

5                  Why don't I take a different position, Judge. Let's  
6 try to find an earlier date in July so that we can at least  
7 come to grips with these issues and I will suggest maybe July  
8 8th, which is the Friday before.

9                  And I don't think it's worthwhile arguing anymore  
10 this morning. The issues are somewhat complex. I've been  
11 studying these cases. I think briefing schedules would  
12 probably two weeks on each side, roughly speaking, the burden  
13 for asserting privileges on the defendants; they should go  
14 first.

15                  THE COURT: Okay. First of all, check the dates.  
16 But do you really need two weeks to brief things?

17                  MS. DAITZ: Well, Your Honor, maybe --

18                  THE COURT: I'm not sure what process you go  
19 through, I mean.

20                  MS. DAITZ: I think the more labor-intensive is  
21 going to be calling the documents for in-camera review if it's  
22 necessary. And it also depends a little bit on whether or not  
23 plaintiffs are challenging 2 or 3 categories of documents or  
24 12 or 13 categories of documents and we haven't gotten that

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2 far in the confer process because again, defendants haven't,  
3 you know, completed their review.

4 THE COURT: Okay. Let me just be clear, though.  
5 You'll have to convince me that you'll need two weeks to do  
6 this when we get to this part. So think about what you'll be  
7 saying to me. I -- first of all, these are not issues that  
8 are going to come up suddenly.

9 You've been discussing them. It seems to me, by the  
10 time that you get to the point of discussing with the other  
11 side you already know what the legal parameters are. And if  
12 you don't have enough of the legal parameters to be presenting  
13 to me I'm not sure why you're presenting it to the other side.

14 So by the time you've made an issue of it with the  
15 other side, it seems to me you should be able to turn around a  
16 briefing fairly quickly so your in-camera notwithstanding.

17 MS. DAITZ: Your Honor, I would just point out that  
18 it's plaintiffs that are challenging defendants' assertion of  
19 privilege. So if plaintiffs made the motion to compel, that  
20 would narrow the issue for defendants in addressing what  
21 categories we need to address in our briefing, and what  
22 documents we need to call to submit to the court.

23 So we believe if it's plaintiffs' application and  
24 they make it, then we may need less time to respond, depending  
25 on the parameter of the scope of their challenge.

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2                   THE COURT: I think you should both count on less  
3 time when it's teed up. We'll try to talk to you in July when  
4 you've bandied this back and forth. Certainly by the bandying  
5 back and forth you'll crystallize and sharpen the issues for  
6 the court.

7                   What do we got in July, Michael?

8                   THE CLERK: Early July, Your Honor.

9                   THE COURT: Well, either the week that has the 12th  
10 or the 8th in it. How about the 12th?

11                  THE CLERK: We have it on Tuesday, July 12th, at 10  
12 a.m.

13                  MS. DAITZ: Your Honor, my only concern is that --  
14 that it's going to be the start of the period for the parties  
15 to brief. That's right before I'll be out of town.

16                  THE COURT: Well that'll be the -- we'll decide  
17 what the situation will be then. And besides, if you're  
18 correct, Mr. Beldock will start the process.

19                  MS. DAITZ: Thank you, Your Honor. There is one  
20 other issue if we're moving on from the work product, and it's  
21 minor. But because this work product meeting has postponed  
22 the ADA depositions and it's been difficult for us to prepare  
23 and produce parties for depositions, we've begun asking for  
24 dates for the familial plaintiffs' depositions so that we can  
25 begin the process of taking. And we're still awaiting

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2 confirmation from the Wise plaintiffs for the date we  
3 suggested for Dolores Wise, and I think that's the only date  
4 we've suggested thus far.

5                 But we anticipate taking some depositions in the  
6 upcoming months also to counter balance what's been delayed by  
7 the privilege review.

8                 THE COURT:    I'm not sure.  Is this an issue for me  
9 to decide?

10                MS. DAITZ:    I don't believe so, Your Honor, I mean  
11 unless plaintiffs are refusing to produce a witness or  
12 something.

13                MS. DIPPOLD:   Your Honor, I would want the court to  
14 be aware of one issue with respect to familial plaintiffs'  
15 depositions.  And that has to do with the fact that we have  
16 been and are still, as Ms. Daitz mentioned, producing releases  
17 and authorizations for records that relate to the familial  
18 plaintiffs.

19                And it would certainly be the plaintiffs' position  
20 that until such time that responses to all those  
21 authorizations have been received and those documents received  
22 by defendants are produced to the plaintiffs, we would not  
23 think it appropriate to schedule the depositions of those  
24 familial plaintiffs.

25                And so we would expect that they'll give us the

1 documents that they're getting in response to these  
2 authorizations before we set dates for their depositions.

3 THE COURT: Okay. Well I'm a little concerned of  
4 the notion of not setting dates even -- are you anticipating -  
5 - what kind of information are you anticipating getting that  
6 the defendants get --

7 MS. DIPPOLD: Well for example, just within the  
8 last week there is one plaintiff, familial plaintiff I know  
9 of, that there were probably 20 or 30 authorizations handed  
10 over at defendants' request to corporation counsel's office.

11 We don't think it would be appropriate to proceed  
12 with the deposition of that person until all the records  
13 responsive to those authorizations have been produced, and  
14 produced to our office. So that the witness, the non-party  
15 witness, can be properly prepared to be deposed.

16 THE COURT: What kinds of information are we  
17 talking about?

18 MS. DAITZ: Your Honor, when we get information  
19 responsive to subpoenas, I think the information we're  
20 discussing here is medical records, employment records, parole  
21 records, arrest histories, things of that nature that we've  
22 received releases for.

23 We prepare it and produce it to plaintiffs. We  
24 don't hold off the documents for some extended period of time.

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2 We prepare them, clump them together, and serve them. So I  
3 don't think there's any issue about the defendants having  
4 documents and taking a deposition without producing the  
5 documents to plaintiffs before the deposition goes forward.

6 And certainly, when there are familial plaintiffs  
7 who are still providing releases, which it bears noting, is a  
8 cause of certain of the delay here in us going forward with  
9 taking the remaining depositions that we're still receiving  
10 releases, that the defendants were granted a motion to compel  
11 in November of 2010.

12 If we're prepared to go forward with familial  
13 plaintiffs' deposition, because we've received the responses  
14 that we expect to receive, and produce the documents to  
15 plaintiffs, then we expect the deposition to be scheduled.

16 THE COURT: I'm not sure you said different things  
17 and I thought Ms. Dippold said don't schedule depositions  
18 until you've gotten the information. Is that the same thing  
19 you're saying?

20 MS. DAITZ: I'm sorry, Your Honor. May I just have  
21 a moment to confer with my colleagues?

22 (Pause in proceedings)

23 MS. DAITZ: Your Honor, we believe to the extent  
24 that we've suggested dates for familial plaintiffs, that we  
25 have the information necessary to go forward with the

1 deposition. And of course if we have information necessary,  
2 we are -- we've produced it to plaintiffs. I think we're  
3 anxious to start taking these familial plaintiff depositions.  
4 It's a, you know, 20 of the remaining depositions so they  
5 certainly need to be done.

7 THE COURT: So the bottom line is you're not  
8 disagreeing with the plaintiff. You say, yes, they have it  
9 and you're giving it to the plaintiff.

10 MS. DAITZ: Well, and to the extent if there's  
11 anything outstanding. I mean, certain providers are just not  
12 giving us prompt responses. Certain providers we've  
13 subpoenaed multiple occasions and get no responses.

14 Certain subpoenas we've sent out and get returned as  
15 undeliverable. So we don't want to wait until we have an  
16 outcome for every possible subpoena that we serve. We accept  
17 that we're probably not going to receive documents responsive  
18 to certain of the subpoenas and we're prepared to move forward  
19 with what we have now.

20 I just want to make clear that whatever we have now,  
21 in anticipation of the familial plaintiff deposition such as  
22 Dolores Wise, we'd produce that to plaintiffs. We're not  
23 sitting on --

24 THE COURT: Okay. And so Ms. Dippold, assuming  
25 they -- let's say they send out ten requests and they got back

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2 eight, and the other two don't seem like they're going to be  
3 fruitful. You want to wait until the other two come back?

4 MS. DIPPOLD: Well, Your Honor, quite frankly when  
5 I send out authorizations to them, I keep track of what  
6 authorizations they have produced records that are responsive  
7 to that particular authorization. I can say that I don't know  
8 of a single familial plaintiff whose records have been  
9 produced for authorizations and indeed, I sent out a letter  
10 about a week ago that said you haven't produced authorization  
11 to the response to this authorization and that authorization.

12 So I'm keeping track of it. I don't think they've  
13 all been produced. I think if they're in a situation where  
14 they sent out an authorization and the person is not  
15 responding. If they tell me, we're not getting a response to  
16 this, or this entity has said they don't have records, if they  
17 tell us that, then we can fill in some of the gaps. But I  
18 don't think that they have produced all of the records that we  
19 have sent authorizations for.

20 THE COURT: Okay. Before you say anything, but if  
21 I understand you correctly, you're not suggesting that if they  
22 sent out requests that they all have to come back. Because we  
23 know that sometimes there's going to be some non-responsive  
24 people.

25 MS. DIPPOLD: Indeed, and tell me that. For

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example, I can think of one familial plaintiff who underwent some therapy. Long, long ago I sent out an authorization permitting them to have access to those documents. And no one has ever said they don't have any documents. They haven't produced any documents. I've heard nothing. So just tell me what the situation is and then we can know when we're ready to do that familial plaintiffs' deposition.

THE COURT: Okay. Now before you say anything, Ms. Daitz, let me just say that what I'm hearing from you is consistent to what I think should happen, and that is this: You send out requests to a number of, whether it's hospitals or whatever, and you determine who's responsive, who's not responsive, whether or not it takes follow-up.

You have a conversation with the other side and you say, okay, here you gave us ten authorizations, we got back six responses, the other four we don't think we're going to do anything. Two of them, maybe, but we think we should go ahead and set the date.

I think under those circumstances, you set the date. You don't wait for the four that are recalcitrant. And all it means is that you both understand at that point, so that the plaintiffs aren't wondering if the defendants are going to get something and sandbag them, and the defendants let the plaintiffs know whatever they have.

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2           So you seem to both be agreeing on what the  
3 procedure is and so as long as you do what I've just  
4 suggested, I don't see what the problem is. I think you  
5 should be able to set a deposition when you've gotten back all  
6 you reasonably expect to get back, and you both agree that  
7 it's a good time to set the deposition.

8           Now, it's certainly possible that you might set the  
9 deposition and something might come in, in the interim, then  
10 you adjust. But for now, as long as you're not taking -- as  
11 long as the plaintiff is not taking the absolute condition  
12 that everything's got to come back, and the defendants are  
13 keeping the plaintiffs apprized, I don't see why there's a  
14 difficulty here.

15           MS. DAITZ: Your Honor, only for the sake of the  
16 record, the defendants have been producing all the letters  
17 that we get back from every entity that says they have no  
18 responsive records on file.

19           So to the extent we've received something back, we  
20 Bates number it and produce it as a discovery document to  
21 plaintiffs. The only entities that plaintiffs have heard no  
22 word of after months and months are the same entities that  
23 haven't responded to our multiple subpoenas.

24           So if they haven't heard it's because we haven't  
25 heard either; not because we have something or received some

1 correspondence from these entities --

2 THE COURT: Okay. Well let me just --

3 MS. DAITZ: -- and haven't apprized plaintiffs.

4 THE COURT: Let me just stop you for a moment. I  
5 understand that -- so sometimes we come into these conferences  
6 and I have to remind you that on each side I always perceive  
7 that there's a lack of trust.

8 Okay. The simple thing to do is to have a  
9 conversation and just go through these things and say, this is  
10 what we have and what we haven't had. I understand that if  
11 you're saying that there are some things that you haven't  
12 gotten responses from all you need to do is have a  
13 conversation about each of the named plaintiffs and just do a  
14 checklist.

15 This is not a, you know, I mean -- and you could  
16 both be exactly correct in what you're saying. And when the  
17 plaintiff doesn't -- there's nothing wrong with what you're  
18 doing if you're saying if you don't get a response, you don't  
19 tell the plaintiff. In the abstract there's nothing wrong.

20 On the circumstances of the relationships that have  
21 not developed over time in this case, just have a conversation  
22 in which you each have your checklist about what you've had in  
23 terms of authorizations and what responses you've gotten back  
24 and then schedule a deposition.

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2           And if your checklist says, we haven't heard  
3 anything from this person, you tell Ms. Dippold -- or whoever  
4 it is on the plaintiff side -- and you move on. There  
5 shouldn't be anything where anybody's wondering what happened  
6 or what hasn't happened. Can we just do that?

7           MS. DIPPOLD: Yes, Your Honor.

8           THE COURT: Okay. For all the plaintiffs, since  
9 Ms. Dippold has said that she's got a checklist, you can just  
10 check with her checklist and see if everything is fine.

11 Anything else? Do we have a date?

12           MS. DAITZ: Nothing from defendants, Your Honor.

13           MR. BELDOCK: Did Your Honor agree to extend the  
14 time until September 30th?

15           THE COURT: I will extend the time and since it's a  
16 joint request until September 30th, and we'll talk more about  
17 that on July 12th. And this is a minor comment as we depart,  
18 and this is for you, Ms. Daitz.

19           In talking about the government's responses, you  
20 used the phrase that you're going to do it with all deliberate  
21 speed. I might suggest that that's probably not the best  
22 phrase to use in a civil rights case.

23           MS. DAITZ: Sorry, Your Honor.

24           THE COURT: Because the last time I think that  
25 phrase was used it was 14 years before they got around to

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2 | doing anything. So I'm sure I didn't mean that.

3 MS. DAITZ: Deliberately expeditious, Your Honor.

4 THE COURT: Without delay. In any case, again,  
5 since we're in the -- we're still in the month of May and I  
6 just -- I was still thinking about the Brown decision. And so  
7 when you used that phrase I wasn't sure what was coming after  
8 that. So -- but I knew you didn't mean what they meant.

9 MS. DAITZ: I did not, Your Honor, by any means.

10 THE COURT: Otherwise, I'm sure that the plaintiffs  
11 would've jumped up and told me that's unacceptable. Anyway,  
12 we'll see you in July.

13 (Whereupon the matter is adjourned to

14 | Tuesday, July 12, 2011.)

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## C E R T I F I C A T E

I, Carole Ludwig, certify that the foregoing transcript of proceedings in the United States District Court, Southern District of New York, McRay, Richardson, et al. v., Docket #03cv9685 was prepared using mechanical transcription equipment and is a true and accurate record of the proceedings.

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